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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 436

BIRDIE MAE DAVIS, et al.,
Petitioners,

v.

BOARD OF SCHOOL COMMISSIONERS OF MOBILE COUNTY, et al.

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

"For almost a decade there have been judicial efforts to desegregate the schools of Mobile County, Alabama. We wonder when the epilogue will be written." . . . (Judge Goldberg, Opinion in Fifth Circuit number 27849, a collateral proceeding to the primary desegregation case.)

"I have said many times that the best thing that could happen would be for this litigation to come to an end. This is true. But I am unwilling to disregard all common sense and all thoughts of sound education, simply to achieve racial balance in all schools. I do not believe the

law requires it. And this litigation will continue to be stirred as long as adequate funds are provided for those who want litigation for the sake of litigation, without regard to the rights of the children and parents involved. The Court has attempted as nearly as possible to comply with the mandate of the Appellate Courts and yet leave it humanly and educationally possible to operate the schools." . . . (Judge Daniel H. Thomas' opinion attached as part of the January 31, 1970, District Court decree in this case.)

OPINIONS BELOW

The Petition seeks a writ of certiorari to review an opinion and judgment of the Court of Appeals entered on June 8, 1970. Since the petition was filed, the following has occurred:

(a) The District Court has entered orders dated June 12, 1970 and July 13, 1970 and July 30, 1970 modifying substantially the provisions of the desegregation plan set out by the Court of Appeals in its judgment of June 8, 1970.

(b) The June 12, 1970 and July 13, 1970 Orders of the District Court have been appealed by Petitioner to the Court of Appeals.

(c) The Court of Appeals, upon the motion of Petitioner seeking various orders and preliminary injunctive relief pending appeal, has recalled and amended the mandate of its June 8, 1970 judgment and has entered a supplemental opinion and amended mandate and order dated August 4, 1970.

(d) In the August 4, 1970 opinion and order the Court of Appeals states that the June 8, 1970 opinion and order and the August 4, 1970 opinion and order, together, shall be considered the final order on the appeal for mandate and certiorari purposes.

Therefore, the statement of the opinions below, should be expanded to include the following:

(1) The Order of the District Court dated June 12, 1970, unreported.

(2) The Order of the District Court dated July 13, 1970, unreported.

(3) The Order of the District Court dated July 30, 1970, unreported.

(4) The Opinion and Order of the Court of Appeals dated August 4, 1970, not yet reported (pages 5a through 17a).

QUESTION PRESENTED

Although we do not feel that such review is desirable, necessary or warranted, the School Board voices no strong objection to a review of this case by the Supreme Court upon writ of certiorari.

We do, however, most strongly urge that there is nothing to require or justify the summary imposition of a still further and different plan of student assignment, pendente lite, whether it be the so-called Plan B-I Alternative suggested by Petitioner, or any other.

The essential question presented to this Court, then, is whether, under the immediate facts present in this case, this school system should now be subjected to another complete reorganization; by the adoption by this Court of another desegregation plan (Plan B-I Alternative) that has been rejected by the District Court and the Court of Appeals as educationally unsound and functionally impossible of implementation, and comes to this Court completely unsupported by testimony in any form; in place of the present desegregation plan which was devised by the United States Department of Justice and the Office of Education of the Department of Health, Education and Welfare, and approved and adopted by the Fifth Circuit Court of Appeals.

STATEMENT

I. General Introductory Information

The Mobile County Public School System is the largest school system in the State of Alabama, with a normal annual enrollment of approximately 80,000 students. The school system is administered by a board of five commissioners elected from the county at large by popular vote in county wide elections. They serve without compensation. The board in turn employs professional administrative personnel, including a superintendent of schools who has a Ph.D. Degree from Columbia University. The system is a combined city-county system encompassing the entire county, which is largely rural, and every city and municipality in the county, the largest of which is the City of Mobile with a population of some 235,000 persons. Thus the School Board must deal with the whole spectrum of problems and difficulties inherent in the desegregation process, from those peculiar to small rural schools and systems, to those associated with affluent suburban schools and systems, to those peculiar to large, compact metropolitan or urban systems.

During the immediate past school year the School Board operated 89 schools and employed 2605 teachers; fifty nine per cent (59%) of these teachers were white and forty one per cent (41%) negro. Student enrollment in the system is normally about sixty per cent (60%) white and forty percent (40%) negro.[1]

[1] The ratio was somewhat different during the 1969-70 school year owing to the disappearance of approximately 6500 white students from the system, apparently as a result of their dissatisfaction with the school board's implementation of the desegregation plans devised by the District Court and promulgated in its August 1, 1969 and January 31, 1970 Decrees.

II. Statement of the Facts

This case has been in litigation since 1963. At that time the school system was, in both a legal and a practical sense, a dual system, with negroes attending one set of schools and whites attending another. There was no student integration, no faculty integration and no integration of services, facilities, activities and programs. This once dual system has now been completely disestablished, and there now exists a unitary school system within which no person is effectively excluded from any school because of race or color; as per **Alexander v. Holmes County Board of Education,** 396 U. S. 19 (1969). The system is unitary in every respect of its operation.

In recent decisions the Courts have set out the various elements that must be taken into account in determining if a school system has been converted from a dual system to a unitary, nonracial system—faculty and staff; transportation; extra curricular activities, including sports; facilities; school construction, consolidation and site selection; transfer policy; and student body composition.[2] The Petition for Writ of Certiorari directly concerns only student body composition. Nevertheless, since this is only one element of the total desegregation process, it is desirable that some attention also be directed toward an examination of the other elements of the conversion from dual to unitary school system, as they exist in the Mobile County Public School System.

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[2] **Singleton v. Jackson Municipal Separate School District,** 419 F. 2d 1211 (5th Circuit, en banc, December 1969); and **Ellis v. Board of Public Instruction of Orange County,** No. 29,124 (5th Circuit, February 17, 1970).

(1) Faculty and Staff

The School Board has conducted a positive and affirmative program to achieve complete desegregation of faculty. This has been accomplished in many instances at the expense of disregarding the Alabama Tenure Laws, as required by the Court.

The extent of faculty integration has increased sharply each year since August, 1966 when the Court first instructed the School Board to begin faculty desegregation. During the 1967-68 school year, fifteen teachers taught across racial lines. At the conclusion of the 1968-69 school year all but three of the then ninety-one schools of the system had integrated faculties.[3]

Throughout the 1969-70 school year every school in the system had an integrated faculty, and over 20% of the 2605 teachers in the system were teaching across racial lines in schools where the race of a majority of the student body was opposite their own. This includes both Negro teachers in predominantly white schools, as well as white teachers in predominantly Negro schools.[4]

As a result of implementation of the June 8 judgment of the Court of Appeals (the judgment sought to be reviewed by certiorari) with the opening of school in September, the faculty of every school will be approximately 60% white and 40% negro, the approximate ratio of negro and white teachers employed in the system as a whole.

It should be noted that there are negro principals in charge of predominantly white faculties; and negro principals in charge of predominantly white student bodies; as

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[3] Findings of Fact, October 13, 1967, paragraph 23; and Faculty Report to the District Court, December 3, 1968 respectively.

[4] Findings of Fact, April 14, 1970, Attachment E ... and ... Report to the Court dated November 26, 1969, filed at the direction of the Court.

well as white principals in charge of predominantly negro faculties and white principals in charge of predominantly negro students bodies.[5]

(2) Transportation

Mobile is a combined city-county school system with many rural schools. Thus in the traditional manner of rural school systems, there are a substantial number of school busses operated by the School Board to transport students in the rural areas of the county to these rural schools. A few busses are also used to provide transportation for a small number of students residing in remote outlying areas within the city limits.

At one time, during the era of the dual school system, the Board did in fact operate a dual transportation system with overlapping bus routes, utilizing transportation to preserve the dual system. This is no longer the case. Schools in that part of the system where transportation is provided, serve specific geographic attendance zones drawn by the District Court, and approved by the Court of Appeals, sitting en banc, **Singleton v. Jackson**, 419 F. 2d 1211; every zone is bi-racial and every school is integrated. School busses are routed in such a manner as to transport all students in each attendance zone to the school serving the zone. These routes are drawn without regard to race; they do not overlap; each bus picks up and transports every student on its route regardless of the race of the student; students are not segregated within the busses; and the same quality and extent of service is provided in all areas of the county without reference to the race of the students living in the area.[6] The transportation system is thus operated on a non-segregated and non-discriminatory basis in every respect.

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[5] Findings of Fact, April 14. 1970, page 8 . . . Refer also to Appendix I attached to this brief.

[6] Findings of Fact, April 14, 1970, pages 9-10, page 3 and Attachment A.

(3) Extra Curricular Activities, Including Sports

All extra curricular activities, including sports, over which the School Board has control, are being operated on a non-segregated basis throughout the system, and have been for several years.[7]

All athletic teams at every school are open to every student regardless of race. Participation by minority race students, particularly by negro students at traditionally white schools, has been substantial. For example, several predominantly white high schools this year fielded bi-racial basketball teams with more negro players than white. There is also cross-scheduling between traditionally negro schools and traditionally white schools in all major sports, in regular season play, and all tournament and play-off competitions are conducted on an integrated basis with traditionally white and traditionally negro schools in competition against each other.[8]

The same situation pertains to all other extra curricular activities over which the School Board has control, such as bands and other musical groups, ROTC units, speech and other academically related competitions, school related social events, parent related activities such as Parent Teacher Associations, and spectator events.[9]

(4) Services, Facilities and Programs

There is no separation of students within the individual schools by race, by sex (except for physical education and gender related courses such as home economics), by class, by tracts or on any basis, other than the normal division of students into grades and courses of study, which divisions have no racial basis.[10]

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[7] Findings of Fact, October 13, 1967, paragraph 22 ... and ... Findings of Fact, April 14, 1970, pages 14-15.
[8] Findings of Fact, April 14, 1970, pages 14-15.
[9] Findings of Fact, April 14, 1970, page 15.
[10] Findings of Fact, April 14, 1970, page 16.

All facilities are made available to all schools in the system without regard to the present or past racial composition of the schools. Within each individual school of the system all facilities are made available to all students on an equal basis, regardless of race. This includes not only facilities in the strict sense such as restrooms, lunchrooms, classrooms, laboratories, gymnasiums, libraries, playing fields and the like; but also, all services, activities and programs such as bands, orchestras, choral groups, clubs, counseling services, student governments, honor societies, publications staffs, intramural sports, assemblies, class elections and honors, parties and social events; and every other facility, activity and program of every school. This has been the situation for several years.[11]

All schools are treated equally without regard to the past or present racial composition of the school, with regard to the allocation of instructional materials, facilities, equipment, furnishings, supplies, textbooks, allocated funds and every other item provided to or for schools of the system; and courses of instruction are offered without regard to race. This also has been the situation for several years.[12]

Not only are all facilities, services, activities, and programs available to every student without regard to race, and operated on a non-segregated, non-discriminatory basis, but actual participation by minority race students is substantial.[13]

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[11] Findings of Fact, October 13, 1967, paragraph 22 . . . and . . . Findings of Fact, April 14, 1970, pages 16-18.

[12] Findings of Fact, October 13, 1967, paragraph 28 . . . and . . . Findings of Fact, April 14, 1970, page 17.

[13] Findings of Fact, April 14, 1970, pages 17-18.

(5) School Construction, Consolidation and Site Selection

The construction of or addition to any school, and the selection of any school site, must have the prior approval of the Court. This has been a part of the Mobile desegregation plan since 1968.

The School Board is genuinely perplexed and uncertain as to what shifting standard may next apply, or from time to time apply, with regard to school construction plans and programs. The Board has already suffered substantial financial loss as a consequence of land acquisition and other construction preparations made with District Court approval, later reversed and erased by the Court of Appeals.[14] As a result the School Board's building program has been at a total standstill for two years. No schools have been constructed and no school sites selected during this time.

The last schools constructed in the system were Dodge and Adams in 1967 and Grand Bay in early 1968. Dodge and Adams opened their doors for the first time in September 1967, both as fully integrated schools. The current enrollment at Dodge is 50 negro and 503 white. The current enrollment at Adams, initially a predominantly negro school, is 311 negro, and 686 white. Grand Bay first

[14] Orders of the District Court dated December 20, 1968 and March 14, 1969 approving the Board's construction plans for a new building at Howard Elementary School and an additional building at Toulminville High School were reversed by the Court of Appeals on June 3, 1969. As a result the School Board has suffered a financial loss of approximately a half million dollars (Brief of Appellees in Court of Appeals number 27,260 and 27,491, pages 6, 13 and 38, also from the transcript of testimony in those cases, Tr. pages 13-16, 29, and 124). Howard has now been abandoned because of its sub-standard facilities. Toulminville continues to operate with an enrollment of 420 negro and 247 white.

opened in September 1968. The current enrollment at Grand Bay is 146 negro and 630 white.[15]

Regarding school consolidation, there have been a number of consolidations, some proposed voluntarily by the School Board and some required by the District Court, within the past three years. Each has resulted in a significant increase in the extent of integration in the system.[16]

Regarding the location of temporary or portable classrooms, the Board follows a policy of locating these solely on the basis of and for the purpose of providing the facilities necessary to accommodate the students assigned to the various schools by the terms of the various orders of the District Court itself.[17]

(6) Transfer Policy

The entire transfer policy now in use, including a majority to minority transfer provision, was formulated by the court itself. This policy is operated in accordance with provision prescribed by the court and is applied uniformally throughout the system.[18]

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[15] Findings of Fact, April 14, 1970, page 19, and Attachment A, . . . and . . . Statistical table attached to the Court of Appeals opinion of August 4, 1970.

[16] Findings of Fact, April 14, 1970, pages 19-22 . . . Refer also to Appendix II attached to this brief.

[17] Findings of Fact, April 14, 1970, page 22.

[18] Findings of Fact, April 14, 1970, page 23.

(7) Student Assignment

The total desegration plan for the whole system, now in full implementation, assigns every student in the system to a school on the basis of a unitary system of geographic attendance zones drawn either by the District Court, the U. S. Department of Justice, or the Office of Education of the Department of Health, Education and Welfare.[19]

(8) Bi-Racial Committee

The District Court, upon the suggestion of the Court of Appeals, has appointed a bi-racial committee to advise and assist the School Board and the Court in the operation of the Court ordered desegregation plan and the maintenance of a unitary school system. The Committee, appointed by the District Court on August 12, 1970, has ten members, five negro and five white.

III. The Essential Points at Issue

In its opinion and judgment of July 8, 1970 (the judgment sought to be reviewed here by certiorari) the Court of Appeals concluded that the school system was unitary in all of its essential elements except three; faculty and staff, and student assignment.

With regard to two of these, faculty and staff, the system is substantially unitary and will be completely unitary upon the opening of school for the new school year on September 9, 1970. (See full discussion at pages 7 through 8 herein.)

In evaluating the unitary character of the system, there is at issue then, only the one remaining element, student assignment; and this is the only issue raised by the Petition. This is conceded by the Petition itself.

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[19] Findings of Fact, April 14, 1970, pages 2-3.

For the purposes of student assignment the system has traditionally been treated by the courts as three distinct parts: **rural,** comprised of all of the county except the cities of Mobile, Prichard and Chickasaw which comprise one large metropolitan area: metropolitan or city **west** of Interstate Highway 65; and metropolitan or city **east** of Interstate Highway 65.

The rural part of the system has been fully, affirmatively and satisfactorily desegregated as the result of the implementation in September 1969 of a plan of student assignment devised by the District Court, approved by the Court of Appeals, en banc (**Singleton v. Jackson,** supra) and reviewed by this Court on Certiorari (**Carter v. West Feliciana Parish School Board,** 396 U. S. 290, per curiam, 1970). So too, the metropolitan or city portion of the system **west** of Interstate Highway 65 has been fully, affirmatively and satisfactorily desegregated as a result of implementation of the same plan. The method of student assignment used in each of these areas is unitary attendance zones drawn by the court itself.

Thus we can further define the essential point at issue as relating only to the element of student assignment for that portion of the system located **east** of Interstate Highway 65.

On June 8, 1970 the Court of Appeals, upon an appeal from a District Court order of January 31, 1970, entered the judgment now sought to be reviewed by certiorari. This judgment concerned primarily student assignment for these schools east of Interstate Highway 65, and set out a complete and specific plan of student assignment for these schools; as well as some schools west of Interstate Highway 65 and two in the rural part of the system. The plan adopted by the Court of Appeals is one that had been submitted to the Court by the United States Department of Justice, which had in turn prepared the plan by modify-

ing a plan originally devised by the Office of Education of the Department of Health, Education and Welfare. As with the remainder of the system, the method of student assignment used by this plan is unitary zones. This plan also closed some schools, consolidated others, paired others, recast the grade structure of others and completely redesigned all of the attendance zones east of Interstate Highway 65. Under this plan, all of the 41 schools affected by the order lying east of Interstate Highway 65 become thoroughly bi-racial in student body composition, except eight elementary schools. This June 8 Opinion of the Court of Appeals is attached to the Petition at pages 8a-22a.

The professional staff of the school system moved immediately to begin compliance with this judgment of the Court of Appeals. Thereafter, on June 12 and July 13 the District Court issued implementing orders, making numerous modifications of the Court of Appeals plan, including elimination of two more of the remaining all negro schools, one by closing and one by redesigning attendance zones, leaving only six.[20] Thereafter, the Court of Appeals entered its order of August 4, 1970 which eliminated yet another all negro school, by assigning approximately 315 white students to Robbins Elementary School. This opinion of the Court of Appeals is attached hereto as Appendix III (A-4–A-15).

The five schools now remaining all negro, as classified by the court, after the August 4, Order of the Court of Appeals are:

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[20] The Court of Appeals in its August 4, 1970 Opinion says seven, counting Council with 40 white and 427 negro students as all black.

	White	Negro
Owens	2	1300
Fonville	37	787
Stanton Road	5	826
Brazier	0	1120
Grant	30	850

These schools are located in the centers of highly urbanized, densely populated residential areas that have, for the most part since the inception of this litigation, become very predominantly negro in character. Their racial make up stems entirely from voluntary residential patterns, and is thus the result of a pure defacto situation, rather than any practice of maintaining segregated schools by law, by design or by any other device (See **Deal v. Cincinnati Board of Education,** 419 F. 2d 1387).

Appendix III attached to this brief contains a statistical table prepared by the District Court as a part of its July 13, 1970 implementing order. This table sets out the enrollments of the schools east of Interstate Highway 65 (as well as those west of Interstate Highway 65 affected by the order) that will result from the June 8 Court of Appeals judgment, as issued, and as modified by the July 13, Order of the District Court. This table does not reflect the further modifications made by the District Court in its Order of July 30, nor those made by the Court of Appeals in its opinion and judgment on August 4, 1970, which accomplishes further desegregation.

ARGUMENT

I

This School System Should Not Be Required to Attempt to Implement Plan B-I Alternative Pendente Lite.

What does Petitioner really seek by this Petition for Writ of Certiorari? **Ostensibly,** to have this Court review a decision of the Court of Appeals in order to insure Petitioners due process right to an evidentiary hearing, and to resolve conflicting rulings of the Court of Appeals. **In reality,** however, what Petitioner is really seeking, under the guise of pursuing an evidentiary hearing and resolution of conflicts, is to have this Court substitute its remote consideration and judgment for that of the District Court and the Court of Appeals, by ordering the *pendente lite* implementation of a desegregation plan that has already been rejected by both lower Courts on two different occasions as "impracticable" and "educationally unsound".

Under the circumstances it is revealing, important and perhaps essential to note that Plan B-I Alternative itself has **never** been before **any** court for an evidentiary hearing.

Plan B-I Alternative was prepared by HEW in two stages. The first stage was the work of Dr. Joe Hall of the Florida School Desegregation Consulting Center. It was submitted to the District Court on July 10, 1969. Dr. Hall submitted a superficially impressive report of some 109 pages to the District Court. Well over half of these pages were devoted to a detailed discussion of typical Chamber of Commerce information, totally irrelevant to desegregation of the school system. For example, the report explains that among Mobile's major industries are cement, naval stores, ship repair, etc.; and its modern ocean terminal can handle 32 vessels simultaneously; and in 1965 unemployment in Mobile totaled 4.3 percent of the civilian "at

place'' labor force; and on and on it goes with reams of similar worthless information.[21]

Dr. Hall's discovery testimony was taken by deposition, during which he declined to indicate just how much of the seventeen (17) days he spent on this matter was expended on such trifling, but he did reveal the following very significant facts:[22]

> (a) The actual desegregation plan was prepared not by himself, but by one Dr. Stolee of Miami, Florida and one Dr. Weinkoff of South Carolina, both of whom had never been to Mobile before; both of whom had no prior contact with or information about Mobile or its school system; both of whom arrived in Mobile one day and departed the next, and prepared the recommendations during the short time of **less than 48 hours.**
>
> (b) He (Dr. Hall) had no ultimate authority with reference to the HEW report. Everything had to be approved by one Mr. Gregory Anrig of the Washington office of HEW. Mr. Anrig did not come to Mobile and had no prior contact with or information about the school system. He had occasion to look at the proposed recommendations only once, for a short time, and yet required numerous changes and alterations.

Dr. Hall indicated to School Board officials that it was impossible for HEW to do a proper job of evaluating the school system and developing adequate recommendations within the time allowed by the Court for the report; and yet because of delay by HEW half of this time had elapsed even before he got started on his work. Dr. Hall also stated that he is professionally opposed to the bussing of

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[21] Refer to the HEW report filed in the District Court on July 10, 1969.

[22] Discovery deposition of Dr. Joe Hall, filed in the District Court.

students for the sole purpose of achieving integration, and yet the ultimate HEW recommendations, after changes by Mr. Anrig, contained massive bussing in pursuit solely of some sort of racial balance.[23]

This first stage HEW report was filed in the District Court and was **totally unsupported** by testimony or explanation other than a very brief informal discussion with the District Court. This was conceded by Petitioner at pages 14b and 15b of the Appendix to its Petition for Writ of Certiorari previously filed in this Court in December 1969.

This report, and particularly the recommendations subsequently rejected as unsound by the lower courts but which Petitioner would now urge upon this Court, were soundly and thoroughly **discredited** by the only professional educator with any background knowledge of the school system who examined them.[24]

The second stage of Plan B-I Alternative was prepared by yet another HEW functionary, one Ernest S. Bunch, who styles himself Acting Senior Program Officer, Equal Educational Opportunities, and submitted to the District Court on December 1, 1969. This stage was the result of less than two weeks attention by Mr. Bunch. Like Dr. Hall before him, Mr. Bunch had no prior contact with or knowledge of the school system.

Mr. Bunch's work took place over a period of less than two weeks, immediately prior to December 1, 1969. Mr. Bunch made no independent study of the school system, conducted no research and gathered no original statistics or information. All Mr. Bunch did was to take statistical

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[23] Affidavit testimony of James A. McPherson, filed in the District Court on July 29, 1969, page 4.

[24] Affidavit testimony of James A. McPherson filed in the District Court on July 29, 1970 . . . and . . . Findings of Fact, April 14, 1970, pages 24-38.

data from the earlier HEW report, juggle these statistics in several different ways and then set out four different alternative plans, one of which was labeled Plan B-I Alternative. Mr. Bunch's ineptness is revealed in many aspects of his work, not the least of which are his recommendations that would make senior high schools out of elementary school plants, create one grade school and assign 2886 students to a school with a capacity of 980.

As with the original HEW report, this Plan B-I Alternative (as well as the other 3 alternatives) did not come before the Court for an evidentiary hearing, and in this instance there was not even an informal conference with the District Judge. Consequently, Plan B-I alternative is not only totally **unsupported** by testimony, but was before the District Court and is now before this Court, even without **explanation.** In seeking to justify the soundness and integrity of his work in the report itself, Mr. Bunch is unbelievably terse, stating only, "all of the plans are based on educational concepts promulgated either recently or not so recently."

Plan B-I Alternative was subsequently thoroughly examined and studied by a professional educator, whose affidavit testimony relative to this examination and study was filed in the District Court. This testimony pointed out numerous fatal defects, and totally discredited the plan, both from the standpoint of its educational unsoundness as well as its functional impossibility.[25]

With this spurious background, it should not be surprising that Plan B-I Alternative is educationally unsound, administratively infeasible, detrimental to the school system as a whole including both black and white students, and functionally incapable of implementation.

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[25] Affidavit testimony of James A. McPherson filed in the District Court on February 24, 1970 . . . Findings of Fact, April 14, 1970, pages 24-38.

This has been recognized by both the District Court and the Court of Appeals, sitting en banc (**Singleton v. Jackson, supra**).

Of the four different alternative plans submitted by HEW in its December 1, 1969 report, Plan B-I Alternative is by far the most unsound, most infeasible, most detrimental of all.

What are some of the specific defects in Plan B-I Alternative?

1. The plan purports to be based upon certain specific geographic zones, but no maps or other description reflecting or stating the location of the boundaries of zones is included with the plan. As far as present relevancy of the plan is concerned, the zones have been changed by the Courts on four separate occasions since the plan was filed on December 1, 1969. The plan, therefore, has absolutely no relation to reality at this time.

2. The basic statistical data upon which the plan was based is now outdated and inaccurate. The original statistical data was gathered and compiled by the School Board in September 1968, and reported to the court. It is now totally inaccurate. Spot checks made of this statistical information, shortly after the HEW report was filed on December 1, 1969, to determine accuracy and relevancy, indicated that in a number of instances the figures are in error by as much as 50%. The HEW report itself recognized this error and sought to excuse itself in advance with this seemingly innocuous statement: "These statistics may or may not agree with current figures of the Board of Education. However, they may be considered as relatively close approximates that could be used as a guide for a more precise sophistication in this vein." No doubt, fifty percent (50%) error is a close approximation to the sophisticated people of HEW, but it is quite impossible to operate a school system of 89 schools and 80,000 students on such a margin.

3. The plan requires the use of one elementary school (Gorgas) that has already been closed by the court and annexed to Toulminville High School (247 white, 420 negro) on which campus it is located, to take care of an overload there which occurs as a result of other provisions of the existing Court ordered desegregation plan. This leaves no place for the 890 elementary students assigned to the Gorgas Elementary School by Plan B-I Alternative.

4. Similarly, Plan B-I Alternative requires for use as an elementary school, another school (Hall) that is already operating under the court ordered plan as a junior high school. Either the 1149 elementary students assigned to Hall by Plan B-I Alternative or the 1246 junior high students already assigned there by the Court of Appeals will have no school to attend.

5. Plan B-I Alternative does not assign to any school the 806 elementary students (300 white and 506 negro) living in the Craighead zone.

6. Plan B-I Alternative makes no provision at all for the sixth grade students living in the following zones:

South Brookley	93
Williams	101
Indian Springs	76
Eight Mile	109
Dickson	121
Fonde	131
Shepard	74
Dodge	92
Total	797

7. Plan B-I Alternative would assign 1174 elementary students to an Arlington-Council complex (Arlington capacity 476, Council capacity 544), but Arlington has already been closed by the Court, and is being used as a book

depository and warehouse and as a laboratory for the in service training of teachers.

8. Plan B-I Alternative does not assign to any school the 591 elementary school students (424 white and 167 negro) living in the Woodcock zone.

9. Utilizing Plan B-I Alternative, results in each of the 264 6th grade students in the Owens zone being assigned to two different schools at the same time.

10. Plan B-I Alternative requires two one-grade elementary schools; seventeen two-grade elementary schools and fifteen three-grade elementary schools, making the development of an adequate program in these schools impossible, and creating an intolerable transportation problem for parents because of the helter-skelter separation and disbursement of students to separate schools. Some students will have been assigned to as many as four different schools by the time they reach the 6th grade, and none will have been assigned to less than three.

11. The basic concept and arrangement of Plan B-I Alternative is a non-contiguous pairing of schools, requiring one-half, more or less, of the students directly affected by the plant to attend school each year in schools far removed from their homes and neighborhoods. In all instances but ten, this requires the students to attend schools that are essentially across town from their homes; in the expected instances (ten schools) it requires attendance not only across town, but in a different city. (Indian Springs, Brazier, Robbins, Hamilton, Chickasaw, Palmer, Glendale, Fonde, Will and Whistler.) There are approximately 27,320 students directly affected by Plan B-I Alternative; this means that each year approximately 13,660 of these students would be so affected. It should be kept in mind that these are not high school or junior high school students, but young elementary school students in grades 1 through 5.

12. Because of the non-contiguous nature of the pairings and the illogical manner in which they have been set up, requiring the movement of students long distances across town and from one city to another, it will be **impossible** for the approximately 13,660 crosstown students to walk to their schools and vehicular transportation will be imperative. To complicate matters, most of the pairings present travel requirements that are inconsistent with commercial transportation routes and normal vehicular traffic patterns.[26] The only answer would be school bus transportation furnished by the School Board. At this point, in time, this is totally impossible; not merely difficult, but **impossible.**

To implement Plan B-I Alternative would require 233 new buses. The acquisition cost of these buses would be approximately $1,269,484.19 and there would be a yearly operating cost of $366,089.60 per year. This school system simply does not have the financial ability to accomplish such a requirement. It is entirely questionable as to whether the school system could adjust its finances to accommodate this requirement over a period of years; it is totally incapable of doing so immediately, between now and the opening of school on September 9, 1970.[27]

In the Petition a studied effort is made, by referring to the present existence of bus transported students, to give the impression that the bussing inherent in Plan B-I Alternative would be justified and would cause little or no problem. In evaluating this contention one must not loose sight of the fact that this is a consolidated city-rural system and that bus transportation has historically been

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[26] The Mobile municipal transit system has within the past year closed entirely, then reopened on a limited basis. At this point it is entirely speculative as to what bus service, if any, will be available in September.

[27] Affidavit testimony of James A. McPherson filed in the District Court on February 24, 1970, pages 11-12.

provided for students in the rural part of the system, as is traditional with virtually all rural and consolidated systems. The existence of rural transportation, however, is totally irrelevant and unrelated to the problem that would be created in the city portion of the system by Plan B-I Alternative, and offers no justification for Plan B-I Alternative nor solution to the massive transportation problem it would create.

One further point must be considered. Given the financial ability to purchase the necessary buses, they still could not be obtained. In June 1970, in an effort to replace worn equipment and to improve existing service with relation to present needs, an order was placed for 50 new buses. Some weeks, later, certain budgetary deficiencies and other financial problems necessitated a reduction of the order, at which time the manufacturer advised the school system that even the reduced order would not be filled because **no** buses are available for purchase.

These are some of the more readily apparent defects in Plan B-I Alternative which render it totally incapable of implementation. The Petition makes the bare, unsupported statement that Plan B-I Alternative has been **proved feasible.** This is simply not true. The plan has not been **proved**; on the contrary, it is not only untested, but comes to the Court unsupported by testimony and even without explanation. It is not **feasible**; it cannot be implemented.

Under such circumstances all logic and reason would dictate that this court defer to the on the scene judgment of the District Court and the Court of Appeals, both of whom have rejected Plan B-I Alternative. This is entirely consistent with the prior holdings of this Court and the various Courts of Appeal. See: **Green v. County School Board of New Kent County, Virginia,** 391 U. S. 430; **Brown v.**

Board of Education of Topeka, 349 U. S. 294; **United States v. Jefferson County Board of Education**, 372 F. 2d 836, 380 F. 2d 385, Cert. Denied 389 U. S. 840; **Downs v. School Board**, 236 F. 2d 988; **Northcross v. Board of Education, of the City of Memphis**, 302 F. 2d 818.

II

It Is Neither Necessary Nor Desirable to Impose ANY New Desegregation Plan on the Mobile County Public School System at This Time.

The unitary character of the school system has been fully discussed in a prior section of this brief. We respectfully submit that the June 8 and August 4 Orders of the Court of Appeals (including the July 13 and July 30 District Court modifications), when added to the other unitary features already existing in fact in the school system, result in a constitutionally sufficient, unitary school system, as per **Alexander v. Holmes County Board of Education**, supra; and that a further hasty rearrangement of the school system, pendente lite, is undesirable, unnecessary, and totally unwarranted.

The mere existence of one or more all negro or all white schools in the system is not unconstitutional and does not render the desegregation plan invalid. See: **Braxton v. Board of Public Instruction of Duval County, Florida**, ... F. Supp. ... (D. C. Fla. January 19, 1970); **Mannings v. Board of Public Instruction of Hillsborough County, Florida**, No. 28,643 (5th Circuit, May 11, 1970); **Deal v. Cincinnati**, 419 F. 2d 1387; **Ellis v. Board of Public Instruction of Orange County, Florida**, 423 F. 2d 203.

Nor must a racial balance be attained in order that a system be unitary and a plan sustained. **Kemp v. Beasley**, ... F. 2d ... (8th Circuit, 1970); **Carr v. Montgomery County Board of Education**, No. 29,521 (5th Circuit, June 29, 1970).

Nor is bussing or cross-bussing either independent of or in connection with pairing, **required** in order to create a unitary school system. **Kemp v. Beasley,** supra; **Deal v. Cincinnati,** supra; **Carr v. Montgomery County Board of Education,** supra.

We would point out one more circumstance of great psychological and human importance. The professional staff and personnel of the school system, and the people of Mobile, black and white alike, have been pushed to the limit of their endurance. It is not exaggeration to state that the school system is on the brink of exhaustion and disaster.

The school year traditionally opens in September each year. Normally, planning for each year would commence the preceding April or May. For the past five years it has been impossible to undertake any real preplanning because of last minute Court Orders requiring substantial rearrangement of the school system in one way or another; such as a shift from neighborhood attendance zones to complete freedom of choice and then back again; or a substantial rearrangement in attendance zones and grade structure. Court orders requiring new and different desegregation plans were imposed upon this school system on August 19, 1966 for the 1966-67 school year; August 24, 1967 for the 1967-68 school year; July 29 and August 3, 1968 for the 1968-69 school year; and on August 1, 1969 for the 1967-70 school year. The 1969-70 school year was further devastated by a further court order on January 31, 1970 requiring mid-year reassignment of some 15,000 students.

Since January 1, 1970 this school system has already been under five different Court ordered desegregation plans, none of which have been prepared by the Board or its professional staff. Two have been implemented, two superseded by subsequent orders before they could be im-

plemented, and one awaits implementation in September, although it is also on appeal to the Court of Appeals by the Petitioner herein.

Each of the last six Court ordered plans has been devised either by the District Court, the Court of Appeals, the Justice Department, HEW, or some combination thereof; but neither of these parties seems to be able to satisfy the other, and the Petitioner has never been satisfied with anything. As a result, the school system has become nothing more than a bloody corpse battered from pillar to post, now lying there oozing its life's blood away while being carved and hacked to bits by its various antagonists; and the School Board has been so stripped of its constitutional and legal function that it can do naught but watch and shudder with horror and remorse.

We respectfully urge your consideration of the possibility that another change in the desegregation plan, especially the imposition of some untried, unproven plan, pendente lite, before the end of the 1970-71 school year may well sound the death knell; and we request that you carefully balance this possibility against the question of whether a change in the existing desegration plan is constitutionally necessary or warranted in any event, in view of the unitary character of the system.

CONCLUSION

The Mobile Public School System is a unitary school system. Any further change in the desegregation plan at this time, can only be for the purpose of juggling people as mere numbers, in pursuit of some sort of artificial numerical racial balance. Consequently, while we voice no strong objection to a review of this case by the Supreme Court upon Writ of Certiorari, we do not perceive that such review is necessary, desirable or warranted.

We do most strongly urge, however, that there is nothing to require or justify the summary imposition of a still further and different plan of student assignment, *pendente lite*, whether it be the so-called Plan B-I Alternative suggested by Petitioner, or any other.

Plan B-I Alternative is particularly undesirable because it is before the court untested, unproved, unsupported by testimony, indeed unexplained. It is but a blind shot in the dark. It is educationally unsound, and functionally deficient; and it cannot be implemented.

We submit, with respect, that the Petition should be denied; and that the request for the imposition of Plan B-I Alternative, pendente lite, should also be denied.

Respectfully submitted

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By .....

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